SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1255

WHITEHOUSE TRUCKING, INC., *Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, HENNIS FREIGHT LINES, INC., ET AL., *Appellees*

On Appeal from the United States District Court for the Northern District of Ohio

MOTION TO AFFIRM OF APPELLEE HENNIS FREIGHT LINES, INC.

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Pursuant to the provisions of Rule 16 1(c) of the Revised Rules of this Court, appellee Hennis Freight Lines, Inc., moves that the judgment of the district court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from a final judgment of a statutory three-judge District Court for the Northern District of Ohio in which the court below, *per curiam*, dismissed appellant's action in which it sought to set aside and have vacated an order of the Interstate Commerce Commission in which a motor common carrier certificate of public convenience and necessity of appellant was construed and in which the Commission ordered appellant to cease and desist from transporting commodities in interstate commerce beyond the scope of its said certificate (J.S. App. A; J.S. App. B). The litigation was brought about by an order of the Commission on its own motion instituting an investigation under authority of Sections 204(c) and 212(a) of the Interstate Commerce Act (49 U.S.C. § 304(c) and 312(a)). A hearing was held before an examiner of the Commission on March 8 and 9, 1965, at which Hennis Freight Lines, Inc., appeared and participated as an intervenor in support of the investigation and Hennis has participated in all other proceedings below. It files this motion to affirm as a party appellee.

The Commission's decision is reported at 99 M.C.C. 621 (*Whitehouse Trucking, Inc.—Investigation and Revocation of Certificates*); and the opinion of the court below is reported at 261 F. Supp. 9 (J.S. App. B, A).

Appellant's predecessor in interest in order to provide service for the prefabricated house building industry, obtained from the Commission a motor common carrier certificate which now is appellant's Sub-No. 45 certificate. It authorizes the transportation of:

> "Prefabricated houses and buildings, prefabricated house and building sections, prefabricated

house and building panels, with parts and accessories."

When appellant obtained the said certificate,* the evidence in the purchase proceeding disclosed that its vendor had transported under the said certificate preponderantly shipments of prefabricated buildings, prefabricated houses, or components of such prefabricated structures. Most of the consignors identified in the traffic exhibits in the purchase proceeding were manufacturers of prefabricated buildings as were the three shippers who appeared in support of the application (J.S. App. A, pp. 9a, 10a).

However, after appellant obtained the said certificate and between February 1, 1963, and February 1, 1964, it transported shipments of various commodities including:

air louvers	porcelain enameled panels
aluminum extrusions	sidings
aluminum roofing sheets	spiral pipe
aluminum windows	steel beams
concrete roofing slabs	steel lathing
conduit pipe	steel pipe
mineral wall insulation	steel roofing
plywood sheets	steel tubes
	wallboard

between points in 19 Midwestern and Southern states. The Commission found that none of these commodities were transported in the same vehicle or on the same bill of lading with prefabricated houses or buildings and it did not appear that any were intended for use in any prefabricated structure. It further noted that

* In MC-F-8097, Whitehouse Trucking, Inc.—Purchase (Portion) Commercial Carriers, Inc., November 14, 1962.

the consignors of the shipments were producers of building materials rather than manufacturers of prefabricated houses or buildings and that the consignees of the considered shipments were most frequently shown to be lumber or building supply dealers rather than contractors or builders (J.S. App. A, pp. 8a, 9a).

In construing the certificate, the Commission held that it authorized the transportation of (1) prefabricated houses and buildings, (2) prefabricated sections which were intended for use in a prefabricated house or building, (3) prefabricated panels which are intended for use in a prefabricated house or building, and (4) parts and accessories which are intended for use in prefabricated house and buildings or in prefabricated house and building sections and panels; and that the operating authority included such items as are commonly identified as "building materials" only to the extent that they are parts and accessories intended for use in prefabricated houses or buildings or in prefabricated house and building sections or panels (J.S. App. A, pp. 17a, 18a). Appellant, on the other hand, took the position in the Commission proceeding and in the court below that the certificate in question authorized it to transport "building materials" generally, thus ignoring totally the presence of the word "prefabricated" throughout the language of the certificate.

The three-judge District Court, *per curiam*, sustained the Commission's interpretation of the certificate in its entirety (J.S. App. A).

ARGUMENT

The mere statement of the case makes it apparent that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument. Contrary to the contention of appellant, the question involved is not of importance to the motor carrier industry nor to the administration of the Interstate Commerce Act. There are extremely few certificates in existence of the type involved here and the motor carrier industry generally is not looking toward this Court for a full interpretation of the certificate language beyond that clearly pronounced by the Commission and sustained by the court below. The facts demonstrate clearly that the Commission granted the certificate in the first instance in order to permit appellant's predecessor in interest to provide a service to the prefabricated building industry so that shippers utilizing the carrier's service might ship the structure itself, substantially complete floor, wall or roof units (i.e., sections and panels), and parts and accessories necessary to complete the specific structure (J.S. App. A, p. 15a). Appellant, however, through a tortured interpretation of the certificate language, elected to construe its certificate to authorize the transportation of "building materials" generally ignoring the descriptive and restrictive word "prefabricated" which appears throughout the certificate. The Commission's interpretation of the certificate under the circumstances was obviously reasonable and clearly not an abuse of its discretion.

(1) The Commission's interpretation has not resulted in the imposition of an additional limitation or amendment to the certificate. Appellant's reliance on

the suspension, termination and amendment provisions of Section 212(a) of the Act (49 U.S.C. § 312(a)) and *U. S.* v. *Seatrain Lines, Inc.*, 329 U.S. 424, is totally misplaced. Appellant contends that the Commission has superimposed a limitation upon its certificate not contained in the terms thereof and thus has effected an amendment not in accordance with the cited provision of the act. The "additional limitation" alluded to but not made clear is apparently the Commission's interpretation of the certificate to mean prefabricated buildings and houses and items in relation thereto. Appellant apparently contends that the Commission by interpreting its certificate in a fashion different from its own tortured interpretation has somehow "amended" the certificate and deprived it of something which it formerly had. There is no merit in this argument. The short answer to this contention is found in *Simpson* v. *U. S.* (D. C. Iowa, 1961), 200 F. Supp. 372-378, affirmed 369 U.S. 526, in which the district court, in a review of a Commission interpretation of a motor carrier's certificate, stated:

> "[6] The plaintiff urges that the action of the Commission, in interpreting his certificates, amounts to a restriction, modification or partial revocation of those certificates in violation of Section 212(a) of the Interstate Commerce Act, 49 U.S.C.A. § 312(a). It is true that the limitations placed upon the Commission's power to modify such certificates may not be by-passed under the guise of interpretation. Andrew G. Nelson, Inc. v. United States (1958), 355 U.S. 554, 558-559, 78 S.Ct. 496, 2 L.Ed.2d 484. However, as stated by the Court in Sims Motor Transport Lines v. United States (D.C. 1959), 183 F. Supp. 113, 117, aff'd (1960), 362 U.S. 637, 80 S.Ct. 1076, 4 L.Ed.2d 1019, in response to a similar argument:

> 'The short answer to plaintiff's first contention is that *the orders* plaintiff asks us to set aside *take no rights from it, but merely interpret what rights it had from the beginning. It is apparent from the record that defendant Commission has not sought to diminish or modify, under guise of interpretative action, or otherwise, the operating authority of plaintiff but has rather endeavored to provide a reasonable and fair construction of the same.'*

"In Andrew G. Nelson, Inc. v. United States, supra, the Supreme Court stated the rule as follows (pages 558-559 (footnote 4) of 355 U.S., page 499 of 78 S.Ct.):

> 'Commission interpretation of * * * a permit, *being simply a definitive declaration of what rights existed from the very beginning under the permit, cannot be equated with modification * * * unless found to be clearly erroneous.'

"Since it has been determined that the report and order of the Commission in the present case is not clearly erroneous, such interpretation *is but declaratory of the operating authority possessed by plaintiff from the time of acquisition of his certificates and in no way diminishes that authority from what it once was.*" (Emphasis supplied.)

(2) Appellant contends under Points 2 and 3 of its jurisdictional statement that the Commission has departed in some fashion from the rule of construction that a plain and unambiguous certificate must be interpreted in accordance with its terms and that the district court misconstrued *Andrew G. Nelson, Inc.* v. *U. S., supra,* as holding that the Commission can, on the basis of its administrative expertise, superimpose upon the plain and unambiguous terms of a certificate a restriction which is not contained in the terms of

the certificate. These contentions are erroneous. In the first instance, the Commission's decision, and the district court's sustaining it, were based on an interpretation of the language of the certificate itself. The Commission expressly pointed out (J.S. App. A, p. 11a) that in this proceeding "we are concerned with a certificate which, on its face, certainly appears to be primarily descriptive of the transportation of prefabricated houses and buildings and certain related commodities." The Commission, after reviewing the evidence and applicable decisions, concluded that:

> "In the instant proceeding, when respondent's certificate is read in the light of Commission usage, we believe that it clearly conveys the intent to restrict the authority set forth to the field of prefabricated houses and buildings. . . ." (J.S. App. A, p. 14a)

And finally it further expressly stated:

> "To the contrary, *should it be considered necessary for us to look behind the wording of the certificate,* the records in the respective application and purchase proceedings clearly show that the considered authority was first granted for the purpose of providing a complete transportation service for the manufacture of prefabricated houses and buildings in order that they might ship the structure itself. . . ." (J.S. App. A, p. 15a) (Emphasis supplied.)

Thus, the Commission reached its ultimate conclusion based on the terms of the language of the certificate alone and merely confirmed that conclusion on other circumstances.

The District Court did not misconstrue *Andrew G. Nelson, Inc.* v. *U. S., supra,* as holding that the Com-

mission can, on the basis of its administrative expertise, superimpose upon the plain and unambiguous terms of a certificate a restriction which is not contained in the terms of the certificate itself. The district court cited *Andrew G. Nelson* for two principles: (1) the interpretation of the commodities authorized to be transported by a certificate is left largely to the discretion of the Commission, and its construction is controlling unless clearly erroneous, arbitrary, an abuse of discretion or in contravention of some established principle of law; and (2) this Court has clearly stated that the Commission may adopt the intended use test (J.S. App. A., pp. 2a, 3a). These principles are both sound and applicable and *Andrew G. Nelson, Inc.* v. *U. S.* was most assuredly not misconstrued by the court below. See *Kroblin Refrigerated Xpress, Inc.* v. *U. S.* (D.C. 1961), 197 F. Supp. 39, 41-42; *Ace Lines, Inc.* v. *U. S.* (D. C. 1960), 197 F. Supp. 591, 595; *Malone Freight Lines* v. *U. S.* (D. C. 1952), 107 F. Supp. 946, 949, affirmed (1953), 344 U.S. 925.

It has long been the practice of the Commission to view as a whole commodity descriptions in motor carrier certificates. *Whitfield Tank Lines, Inc., et al.* v. *Springer Transfer Company, et al.*, 96 M.C.C. 285. This rule of construction has been upheld by the courts on many occasions. For example in *Union Cartage Co.* v *U. S.* (D. C. Mass. 1961), 193 F. Supp. 645, 646, it was stated:

> "The meaning of a phrase, like a word, is shaped and colored by its surroundings. Familiar principals of *ejusdem generis, in pari materia,* or *noscitur a sociis,* are all ways of saying that the whole must be looked at, and not a single part separately."

Yet, appellant seeks to ignore the presence and the meaning of the descriptive and limiting word in its own certificate "prefabricated" rather than view the language of the certificate in its whole context. The Commission's interpretation of the certificate was obviously reasonable and by no means an abuse of its discretion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the questions presented by appellant are clearly insubstantial and that the judgment of the district court should be affirmed.

Respectfully submitted,

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